ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

Joint Comments of e.spire Communications, Inc. and Intermedia Communications Inc.

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SUMMARY

e.spire Communications, Inc. and Intermedia Communications Inc. (collectively, the "Joint Commenters") submit that this proceeding provides the Commission a tremendous opportunity to articulate clearly the technology-neutral underpinnings of Communications Act as the Commission re-visits its initial UNE determinations. The Supreme Court's January 26, 1999 decision has clarified that this Commission has primary responsibility for ensuring that all telecommunications markets become open to competition and that advanced telecommunications capabilities are deployed to all Americans as rapidly as possible. As data-oriented CLECs, the Joint Commenters are keenly interested in the success of the Commission's effort, and therefore welcome this opportunity to provide input to the Commission.

One primary goal of the Commission in this proceeding is to breathe new life into the Act's "necessary" and "impair" standards for defining UNE. The presence of two standards, however, does not suggest that the Commission should consider the impact of its unbundling decisions on competitors' ability to compete in one instance, but not in the other. Under either standard, the Commission must consider non-ILEC sources and several factors, including at a minimum, the ubiquity, cost, and quality of any non-ILEC UNE.

Turning to UNEs, the Joint Commenters note at the outset that the Commission should re-affirm that ILECs must make UNE combinations available based on the Supreme Court's analysis in the *AT&T* decision. According to that decision, the ILECs' unbundling obligation requires ILECs to provide access to UNEs in any technically feasible manner, which includes combinations. Moreover, the Commission's current rules require ILECs to provide CLECs UNE combinations that ILECs use in their provision of service.

The Commission also should re-affirm that use restrictions on UNEs purchased by CLECs will not be tolerated. The plain language of the Act and Commission decisions permit a CLEC to use UNEs to provide any telecommunications services that a CLEC provides. Moreover, permitting use or service restrictions on UNEs would violate this Commission's strong public policy against making regulatory decisions that would drive the technology choices of the private companies. Any other result would permit the ILECs and potentially state commissions – rather than the marketplace – to dictate CLEC business plans.

As for specific UNEs, the Joint Commenters submit that the Commission should re-promulgate the OSS UNE, as well as all transmission-related UNEs, including the Local Loop, NID, Interoffice Transmission, and Signaling and Call-Related Databases. The Joint Commenters also recommend that the Commission establish an Inside Wiring UNE, and an Enhanced Extended Loop UNE. The Commission also should make clear that the UNEs listed above include any cross-connects needed for connection to other UNEs or collocated equipment. In addition, all UNEs must be available for both traditional circuit-switched services and advanced packet-switched services. The Commission also should take this opportunity to define UNEs specific to packet-switching to encourage the rapid deployment of advanced services, including Frame Relay and ATM.

Finally the Commission should expressly state that section 252's cost-based pricing standard applies to all UNEs and combinations of UNEs. The Commission should indicate that it will foreclose any effort – by ILECs or others – to lard UNEs with non-cost-based charges. The Commission should affirmatively conclude that CLECs may convert special access circuits to UNEs without payment of additional charges. ILECs must not be permitted to assess "glue charges" on UNEs. The Commission also should re-affirm that ILECs may not assess

access charges on telecommunication carrier use of UNEs to provide exchange access service, and UNE prices may not include subsidies or embedded access charges.

By taking the steps proposed by the Joint Commenters, the Commission will go a long way toward advancing that state of local competition throughout the nation.

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e.spire Communications, Inc. and Intermedia Communications Inc. (collectively, the "Joint Commenters"), by their attorneys, hereby provide their Comments to the Commission in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The Joint Commenters are facilities-based competitive local exchange carriers ("CLECs") that offer a wide-array of end-to-end data and voice services to business customers. e.spire Communications, Inc. ("e.spire") supplies customers with traditional and advanced telecommunications service through its SONET-based fiber-optic local networks. e.spire provides advanced data, Frame Relay, and Internet service. At this time, e.spire has completed construction of local fiber networks in 35 markets, has installed 22 local exchange switches in the eastern, southeastern, and southwestern United States and also has deployed 66 data switches nationwide. Intermedia Communications Inc. ("Intermedia") provides a full range of telecommunications services throughout the nation. Intermedia offers a variety of advanced

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *Second Further Notice of Proposed Rulemaking* (rel. Apr. 16, 1999) ("*FNPRM*").

telecommunications services, including asynchronous transfer mode ("ATM"), Frame Relay, integrated services digital network ("ISDN"), and Internet access, over its own data network. To date, Intermedia has deployed over 175 data switches and 20 voice switches throughout the country.

Regarding the "necessary" and "impair" standards, the Joint Commenters concur in the definitions proposed by the Association for Local Telecommunications Services ("ALTS") in its comments. At bottom, the "necessary" standard applies only to elements of incumbent local exchange carrier ("ILEC") networks that are "proprietary," and the "impair" standard applies to all other elements of ILEC networks. Recognizing the sensitivity of disclosing sensitive intellectual property, the Act requires access to proprietary elements only when "necessary."[2] For non-proprietary network elements, the "impair" standard is invoked.[3] Under the "impair" standard, non-proprietary network elements must be made available to a CLEC unless a ubiquitous, interchangeable substitute for the ILEC UNE is available at a comparable price.

The Joint Commenters also submit that the Commission should mandate that UNEs be made available in combination. Technological advances, marketplace developments, and the inherent advantages of ILECs warrant the establishment of such UNE combinations – especially combinations of UNEs over which the ILECs offer advanced services to their end

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2 47 USC § 251(d)(2)(A).

3 *Id.* § 251(d)(2)(B).

users. In addition, the Commission should reaffirm that the technology-neutral underpinnings of the Act foreclose state commissions and ILECs from placing use restrictions on UNEs or favoring one market-entry strategy over another.[4] The principle of nondiscrimination suggests that the Commission should minimize to the extent practicable the degree to which regulation drives the technology or marketing decisions of private companies.

As for specific UNEs, the Joint Commenters submit that the Commission should re-promulgate the operations support system ("OSS") UNE, as well as all transmission-related UNEs, including the Local Loop, Network Interface Device ("NID"), Interoffice Transmission, and Signaling and Call-Related Databases. The Joint Commenters also recommend that the Commission establish an Inside Wiring ("ISW") UNE and an Enhanced Extended Loop ("EEL") UNE.

The Commission should clarify that each of the above-mentioned UNEs includes any cross-connects needed for connection to collocated equipment or for connection to other UNEs. Moreover, UNEs must support traditional circuit-switched applications as well as broadband and packet-switched applications. For example, CLECs need access to high-capacity local loops and transport facilities at the DS3, OC3, OC12, and OCn levels to deliver bandwidth intensive applications to end-users. Similarly, the availability of "clean copper" loops[5] is a prerequisite to the provision of competitive digital subscriber line ("DSL") services. Access to

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4 Nor should ILECs be able to impose different performance standards or rates on UNEs depending on the uses to which CLECs put such UNEs.

5 "Clean Copper" loops are loops without electronics that have been conditioned for the provision of digital services, including DSL. The conditioning process involves removing loading coils and bridged taps from local loops.

dark fiber loops and dark fiber transport also is critical to the rapid deployment of high-capacity services.

The Commission also should establish several data-specific UNEs to promote the deployment of advanced telecommunications capability, including ports on data switches and routers as well as the associated connectivity between those ports appropriate to the type of packet-switched protocol in use (e.g., Frame Relay, ATM, Internet Protocol ("IP"), etc.). Each of these items is critical to the competitive provision of advanced packet-switched data services.

Lastly, with regard to pricing, the Commission should find that section 252's cost-based pricing standard applies to all UNEs and combinations of UNEs, and foreclose any effort to saddle UNEs with non-cost-based charges. The Commission should affirmatively conclude that CLECs may convert special access circuits to UNEs without payment of additional charges. ILECs must not be permitted to assess "glue charges" on UNEs. The Commission also should require that ILECs make UNEs available at volume and term discounts.

II. THE JOINT COMMENTERS CONCUR IN THE DEFINITION OF THE NECESSARY" AND "IMPAIR" STANDARDS PROPOSED BY ALTS

The Joint Commenters agree with the "necessary" and "impair" standards devised by ALTS. Section 251(d)(2) provides:

> In determining what network elements should be made available for the purposes of subsection (c)(3), the Commission shall consider at a minimum, whether –
>
> (A) access to such network elements as are proprietary in nature is *necessary*; and

> (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[6]

This test distinguishes between proprietary and nonproprietary network elements – access to a proprietary network element is available only where "necessary," and access to a nonproprietary network element is available if lack of access would "impair" the ability of a CLEC to offer service.

The Commission should construe narrowly the term "proprietary" and consider a network element proprietary only if use of the element by a requesting carrier would: (1) result in the release of customer information that is available solely due to processes or applications developed and implemented exclusively by the ILEC or (2) reveal ILEC-specific methods or processes covered by intellectual property rights and protections, including those available under copyright, patent, and trademark law. An element should be considered "proprietary" only when the proprietary aspects of a network element must be revealed when the particular element is unbundled.

In determining whether unbundling a proprietary network element is "necessary," the Commission must evaluate whether comparable functionality can be obtained through unbundled access to non-proprietary ILEC network elements, through self-provisioning, or through a non-ILEC source.[7] However, for a non-ILEC element to be an effective substitute, the

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6 47 USC § 251(d)(2) (emphasis added).

7 *FNPRM* ¶ 21.

non-ILEC network element may not be one that is just theoretically available, but one that is available in the real world on a widespread basis. In other words, unless the alternative network element could be – and is – substituted in a way that results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market, the non-ILEC alternative is irrelevant to the statutory test, as it does not provide CLECs with a means to compete.

The presence of two standards, however, does not suggest that the Commission should consider the impact of its unbundling decisions on competitors' ability to compete in one instance, but not in the other. Instead, the Joint Commenters suggest that, in applying either the "necessary" or the "impair" standard, the Commission should consider whether a requesting carrier's ability to compete will be materially diminished. If failure to gain access to a "proprietary" UNE would materially impair CLECs from competing (*e.g.*, access to information needed to electronically bond OSS systems), then it would be "necessary" for the CLECs to have access to the item as a UNE.

Under either standard, the Commission must consider non-ILEC sources and several factors, including at a minimum the following:

> (1) Availability – whether a substitute UNE is available with the same ubiquity as the ILEC UNE (*e.g.*, whether the CLEC will have access to a substitute UNE at all interconnection points where CLECs are located – POPs, collocation nodes, etc.);
>
> (2) Timeliness – whether a substitute UNE may be obtained without significant network reconfiguration and without added "time to market";
>
> (3) Cost – whether the cost of a substitute UNE approximates the TELRIC rate (including recurring and nonrecurring charges); and

> (4) Quality – whether a substitute UNE is available at terms and levels of quality similar to the ILEC UNE (*e.g.*, provisioning intervals, the ability to obtain without long-term commitments, meeting same industry technical standards, the ability to obtain the same volumes as UNEs etc.).

When these factors are met, the result should be that the substitute is in fact in widespread use by competitors entering the market.

In applying the "necessary" and "impair" standards, the Joint Commenters support the Commission's tentative conclusion that it "should continue to identify an initial list of network elements that must be unbundled on a nationwide basis."[8] In so doing, the Commission should clarify that a "necessary" or "impair" analysis will be used for modifying the national list to add, modify, or remove UNEs. The Joint Commenters recommend that the burden of proof fall on the carrier seeking the change to the national list, be it an addition, modification, or deletion. ILECs most typically will bear the burden of proof in seeking to retire UNEs.[9] CLECs most typically will bear the burden of proof in attempting to add new UNE. In addition, the Joint Commenters suggest that the Commission continue its practice of allowing state commissions to create new UNEs, but state commissions should not be allowed to take UNEs off of the national list, even for their own state. Such a result would maintain the *status quo* with regard to the establishment of UNEs.

For removing UNEs, parties should be able to file with the Commission a waiver request, which could apply to a specific state, an ILEC region, or the national minimum list. In

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8 *Id.* ¶ 14.

9 A competitive provider of a UNE, of course, could also petition the Commission to remove a UNE from the initial federal list in a given state, ILEC territory, or nationally.

the event that the Commission grants a state-specific waiver, grants an ILEC-specific waiver, or removes a UNE from the national list entirely, the Joint Commenters submit that the CLECs should have the ability to continue purchasing any item in the relevant geographic area in which a UNE is retired: (1) for the period of one year or (2) according to the terms and conditions of interconnection agreements, whichever is longer. Embedded UNEs serving existing customers should be grandfathered to avoid service disruptions and customer inconvenience. ILECs historically have grandfathered services for their retail customers to avoid disruption, and CLECs should have the ability to benefit from this standard industry practice as well.

III. BASED ON THE SUPREME COURT'S ANALYSIS, THE COMMISSION SHOULD REAFFIRM THAT ILECs MUST MAKE UNE COMBINATIONS AVAILABLE

The Commission has recognized that "[t]he ability of requesting carriers to use unbundled network elements, including combinations of unbundled network elements, is integral to achieving Congress's objective of promoting rapid competition in the local telecommunications market."[10] The Commission is fully empowered to require ILECs to provide UNE combinations. As the Supreme Court noted, section 251(c)(3) "does not say, or even remotely imply, that elements must be provided [in discrete pieces] and never in combined form."[11] Without combinations, ILECs will have an unfettered ability to impair CLEC provisioning of all telecommunication services, especially advanced services. Thus, in accord with the Supreme Court's decision, the Commission should affirm that: (1) the ILECs' section

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10 *FNPRM* ¶ 2.

11 *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 737 (1999) ("AT&T").

251(c)(3) unbundling obligation requires the provision of UNEs in combination and (2) section 51.315(c) of the Commission's rules requires the ILECs to provide EEL combinations[12] to CLECs.

A. The ILECs' Unbundling Obligation, Contained in Section 251(c)(3), Requires ILECs to Provide Access to UNEs in Any Technically Feasible Manner, Including UNEs in Combination

The Commission should reaffirm that ILECs must provide UNEs in combination, if requested to do so by a CLEC. Section 251(c)(3)[13] of the Act requires ILECs to provide CLECs with unbundled access to UNEs at any technically feasible point, including in combination. The Act endorses no specific technological means of recombination. Rather section 251(c)(3) requires ILECs to provide access to UNEs at any "technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory...."[14] As evidenced by their own provision of service to retail customers, UNE combinations – including the EEL – are technically feasible. Thus, ILEC failure to offer the EEL combination or other combinations would result in exactly the type of discrimination contemplated by section 251(c)(3).

To date, ILECs have maintained that CLECs must use some form of collocation to recombine UNEs for themselves in spite of the fact that nowhere in section 251(c)(3) is the word "collocation" used. Neither collocation (which is provided for in section 251(c)(6)) – nor collocation variants – satisfy the nondiscrimination requirements of section 251(c)(3). Indeed, as

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12 An EEL is a local loop, transport, and in some cases, multiplexing combination.

13 47 USC § 251(c)(3).

14 *Id.*

the Commission has noted, the ILECs' obligation to provide nondiscriminatory access to UNEs is entirely separate from the ILECs' obligation to offer various forms of collocation:

> In enacting sections 251(c)(3) and 251(c)(6), Congress established two separate provisions that impose distinct duties on incumbent ILECs in providing access to their networks. Section 251(c)(6) imposes an obligation on incumbent LECs 'to provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements' .... Section 251(c)(3) imposes a separate obligation on the incumbent LEC to provide 'nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory.... *Nothing in the language of section 251(c)(3) limits a competing carrier's right of access to unbundled network elements to the use of collocation arrangements. If Congress had intended to make collocation the exclusive means of access to unbundled network elements, it would have said so explicitly.*[15]

Because unbundled access and collocation are entirely distinct obligations, whether an ILEC offers collocation in accordance with section 251(c)(6) is wholly unrelated to whether an ILEC offers unbundled access at "any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."[16] Accordingly, because the Commission has found that (1) collocation does not satisfy the requirements of section 251(c)(3)

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15 *Application of BellSouth Corporation, et al. For Provision of In-Region InterLATA Services in Louisiana,* CC Docket No. 98-121, *Memorandum Opinion and Order* ¶ 168 (rel. Oct. 13, 1998). While the Commission's recent collocation order should greatly improve the terms and conditions of collocation, the Joint Commenters maintain that this does not change the fact that nothing in the Act – or the Commission's rules – requires CLECs to collocate to combine elements that the ILEC combines for itself, such as loop and transport.

16 47 U.S.C. § 251(c)(3). Indeed, this conclusion is mandated by common principles of statutory construction -- when different "parts of a provision ... use different language to address the same or similar subject matter, a difference in meaning is assumed." *Harmelin v. Michigan*, 501 U.S. 957, 958 (1991).

and (2) ILECs must provide any technically feasible means for accessing UNEs, the Commission must reaffirm that ILECs are required to provide UNEs to CLECs in combined form.

B. Section 51.315(b) of the Commission's Rules Requires the ILECs to Provide EEL Combinations to CLECs

The Commission should reaffirm that section 51.315(b) of its rules mandates that ILECs must make available to CLECs combinations of UNEs that exist in the ILEC network, including the EEL.[17] Section 51.315(b) provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[18] In upholding this rule, the Court stated that unbundled means "to give separate prices for equipment and supporting services."[19] With that definition in mind, the Court rejected the ILEC view that "the phrase 'on an unbundled basis' in [section] 251(c)(3) means 'physically separated.'"[20]

For sake of clarity, the Joint Commenters request that the Commission reaffirm that under 51.315(b), ILECs must make available to CLECs combinations of UNEs that the ILECs make available to their end-users, including EEL combinations. In its provision of data services to end-users, ILECs use combinations of loops, transport, and multiplexing to provide

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17 The Joint Commenters note that EEL combinations maintain a bright line between section 251(c)(3), unbundling, and section 251(c)(4), resale, as EEL combinations are not a finished service, but rather a continuous transmission facility that extends from the customer premises to the CLECs switch.

18 47 CFR § 51.315(b).

19 *AT&T Corp.* at 735 (citations omitted)

20 *Id.* (citation omitted).

connectivity. For example, many ILECs (including, Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and U S WEST) provision DSL services – as native DSL or as T1 service over HDSL – and other data services (*e.g.*, Fame Relay and ATM) to their retail end-users using EEL arrangements. These data circuits are the functional equivalent of EELs, and the ILECs' collective refusal to provide similar technically feasible combinations contradicts section 51.315(b) of the Commission's rules as well as the nondiscrimination requirement of section 251(c)(3) of the Act.

In addition, the Joint Commenters note that Bell Atlantic is providing unrestricted DS1-level EELs to AT&T pursuant to the Dedicated Transport provision of the Bell Atlantic/AT&T interconnection agreement in New York, but is refusing to do so for others. Under the Bell Atlantic/AT&T agreement, Dedicated Transport is defined as:

> an interoffice transmission path between designated locations to which a single carrier is granted exclusive use. Such locations may include NYNEX central offices or other equipment locations, AT&T network components, or *Customer premises*....[21]

This definition of dedicated transport is functionally identical to the EEL, and pursuant to an arbitration award interpreting this provision,[22] Bell Atlantic is converting AT&T special access circuits to Dedicated Transport UNEs, the rates of which have been set at TELRIC by the New York Public Service Commission ("NYPSC"). Bell Atlantic has flatly rejected efforts of Intermedia to exercise its section 252(i) rights to adopt the Dedicated Transport provision of the

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21 BANY/AT&T Interconnection Agreement § 2.9.5.2 (emphasis added).

22 Bell Atlantic-New York/AT&T Arbitration Award, attached hereto as **Exhibit A**.

Bell Atlantic/AT&T interconnection agreement.[23] The net result is that Bell Atlantic is using this interconnection agreement to favor AT&T at the expense of other competitors.

The Act does not stand for the proposition that ILECs may discriminate in favor of themselves or in favor of certain competitors in the provision or UNEs or UNE combinations, including the EEL and EEL analogs. To counteract this unlawful discrimination, the Joint Commenters submit that the Commission should reaffirm that ILECs must provide the EEL combination to all requesting CLECs.

III. THE COMMISSION SHOULD REAFFIRM THAT ILECs MAY NOT PLACE RESTRICTIONS ON UNEs

In accordance with the technology-neutral underpinnings of the Act, the Commission should clarify that neither ILECs nor state commissions may place use restrictions on UNEs purchased by CLECs or apply different performance standards to UNEs based on the service purchased by a CLEC customer. Any such use or performance standard restriction on UNEs violates the Act, existing Commission rules, and sound public policy.

A. The Plain Language of the Act and Commission Decisions Permit a CLEC to Use UNEs to Provide Any Telecommunications Services that the CLEC Chooses to Provide

In establishing the access standards for UNEs, Congress directed the Commission to consider whether "the failure to provide access to such network elements would impair the

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23 *See* February 23, 1999, letter from Jeffrey A. Masoner, Vice President, Bell Atlantic Network Services, to Jonathan E. Canis, attached hereto as **Exhibit B**, denying Intermedia's request to adopt the Dedicated Transport provision of the BANY/AT&T Interconnection Agreement.

ability of the *telecommunications carrier seeking access to provide the services that it seeks to offer.*"[24] Similarly, the Act's unbundling requirement directs ILECs "to provide to any requesting telecommunications carrier *for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis."[25] In other words, the 1996 Act makes clear that CLECs have the discretion to determine which services they provide over UNEs purchased from ILECs.

The Commission's rules and orders have consistently supported the view that use restrictions on UNEs are inappropriate, except in extremely limited circumstances. Under the Commission's rules implementing section 251(c)(3), the Commission declared that:

> An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner that the requesting telecommunications carrier intends.[26]

Moreover, the Commission has noted that "[t]he only limitation that the statute imposes on the definition of a network element is that it must be 'used in the provision of a telecommunications service.'"[27] Furthermore, "'access' to an unbundled network element refers to the means by which requesting carriers obtain an element's functionality in order to provide a

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24 47 USC § 251(d)(2)(B) (emphasis added).

25 *Id.* § 251(c)(3) (emphasis added).

26 47 CFR § 51.309(a)

27 *Implementation of the Local Competition Provisions in Telecommunications Act of 1996,* CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) ¶ 261 ("*Local Competition First Report and Order*" (citations omitted).

telecommunications service."[28] Thus, as a general rule, the Commission has found that use restrictions on UNEs are not permitted.

Except for one narrow exception,[29] neither the Act nor the Commission's rules permit any restrictions on a CLEC's ability to choose which services will be provided over CLEC-purchased UNEs or UNE combinations. Any restriction that would dictate or define a minimum list of services that a CLEC must provide (*e.g.*, local dial tone or primarily local service), risks foreclosing new, innovative service providers from using UNEs to deploy the advanced telecommunications services that are now becoming available.[30] Some examples of these services include:

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28 *Id.* ¶ 269.

29 While the Commission has generally foreclosed use restrictions on UNEs, one exception exists related to unbundled local switching. In its *Local Competition Reconsideration Order*, the Commission found that "[a] requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 13042, ¶ 13 (1996). Again, this applies only to carriers that purchase local switching.

30 On March 18, 1999, the FCC adopted an order establishing national standards for collocation and initiating a new proceeding to establish rules involving the provision of unbundled loops and other UNEs to CLECs for the purposes of providing data services, including "line sharing." FCC News Release, *FCC Adopts Rules to Promote the Deployment of Advanced Telecommunications Services* (CC Docket No. 98-147)" Line sharing involves the use of a single unbundled local loop by two carriers – one provides data services, while the other provides voice services. The Commission tentatively concluded that such line sharing is technically feasible, and has solicited comments on the rules it should adopt to implement such sharing. While the Commission's ruling that line sharing is technically feasible is only a tentative conclusion, it necessarily implies that CLECs have the right to use an unbundled loop to provide only data service, apart from voice service.

- Frame Relay services used to connect Local Area Networks or Intranets. These are data applications used over lines that are separate and distinct from those used by the customer for its voice telephony.

- High-capacity Internet access. The "Data CLECs," such as the Joint Commenters, seek to provide this service, even to customers that obtain their voice telephone service from ILECs or other carriers.

- Voice over data applications. Many CLECs, including data-centric CLECs, such as the Joint Commenters, are developing packetized voice services that can be provided over Frame Relay, ATM, or Internet Protocol ("IP"). The FCC has recently issued orders finding that dedicated ADSL-based lines that carry traffic to Internet Service Providers ("ISP")[31] and dial-up connections to ISPs[32] are jurisdictionally interstate.

Similarly, Frame Relay and ATM are primarily interstate, but can and do carry local traffic. A restriction that CLECs may only use EELs or other UNEs to provide predominantly local exchange service would prevent CLECs from providing these and other critically important new services. As noted, the Act is technology neutral, and the Commission has wisely adopted a strong presumption against regulatory decisions that would drive technology."[33] The Commission should continue this course, and reaffirm that any service or use restrictions on UNEs are presumptively invalid.

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31 *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order*, CC Docket No. 98-79 (rel. Oct. 30, 1998).

32 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Declaratory Ruling, CC Docket No. 96-98 (rel. Feb. 25, 1999).

33 *Federal-State Joint Board on Universal Service, Report to Congress*, CC Docket No. 96-45, ¶ 98 (rel. Apr. 10, 1998).

B. Use or Performance Standard Restrictions Violate Sound Public Policy by Discriminating Against Certain Types of Competitors

The Communications Act was designed to be technology neutral, such that market forces, rather than regulatory distinctions would drive the advancement of the nation's communications infrastructure. In the words of the Commission, "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[34] It is vital in this proceeding that, in adopting a nationwide list of UNEs, that the Commission make extremely clear that any sort of use restrictions on UNEs will simply not be tolerated. This is particularly critical because some state commissions and ILECs continue to take the position that they may restrict CLEC use of UNEs, or apply different performance standards to the same UNE depending on what service a CLEC customer uses.[35]

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34 *Deployment of Advanced Telecommunications Capability,* CC Docket No. 98-147, First Report and Order, ¶ 11.

35 As an example, the Joint Commenters note that the NYPSC has permitted Bell Atlantic-New York ("BA-NY") to restrict CLEC access to loop, multiplexer, and transport combinations (known as the "EEL") to circuit-switched POTS service or to low-speed ISDN-BRI service. These use restrictions have resulted in two forms of discrimination against data-oriented CLECs: (1) discrimination by the ILEC in its provision of services (*e.g.*, xDSL loops) to itself and (2) discrimination by the ILEC regarding the terms and conditions of the availability of loops for circuit-switched and packet-switched services. These restrictions favor circuit-switched providers over providers that use packet-switching technology. Not only does this violate the technology-neutral underpinnings of the Act, but it risks permitting a regulatory regime – rather than consumer demand – to drive the technology choices of telecommunications service providers in New York. The restrictions currently in place on the EEL in New York are purely based on technology, and therefore should be rejected as contrary to longstanding Commission public policy.

The Joint Commenters respectfully request that the Commission reaffirm that CLECs may use UNEs to provide any telecommunications service that a CLEC wishes to offer. Moreover, the same performance standards must apply to a UNE regardless of how it is used by a CLEC. Any other result would have the ILECs and regulators – not the market place – pick competitive winners and losers.

IV. IN APPLYING THE "NECESSARY" AND "IMPAIR" STANDARDS, THE COMMISSION SHOULD ADOPT A FUNCTIONAL APPROACH TO DEFINING UNEs, CLARIFY THE DEFINITIONS OF SEVERAL PREVIOUSLY CREATED UNEs, AND ESTABLISH NEW UNEs CRITICAL TO THE DELIVERY OF ADVANCED DATA SERVICES

The Commission should expressly adopt a functional approach in defining UNEs. In so doing, the Commission also should re-promulgate its existing rule defining OSS as a UNE. The Commission should expand the definitions of several of the Commission's original UNEs. In addition, the Commission should establish several new UNEs, to prevent the impairment of CLECs providing data services.

A. The Commission Should Expressly Adopt A Functional Approach In Defining UNEs.

In an effort to break up the network into as many separate physical pieces as possible, ILECs have maintained that the Act's unbundling rules require the Commission to define UNEs as discrete physical items.[36] However, the definition of "network element" in the

[36] *See, e.g., AT&T Corp.* at 735 (rejecting the ILECs' argument that the term "network element" refers only to discrete physical facilities).

Act indicates that Congress intended the Commission to employ a broad, functional approach to defining UNEs:

> The term 'network element' means a facility or equipment used in the provision of telecommunications service. *Such term also includes features, functions, and capabilities that are provided by means of such functions, and capabilities that are provided by means of such facility or equipment*, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service.[37]

Interpreting this definition, the Supreme Court commented that "it is impossible to credit the incumbents' argument that a 'network element' must be part of the physical facilities and equipment used to provided local phone service."[38]

The Eighth Circuit Court of Appeals supported a functional approach to UNEs, even in cases where one UNE was essentially a combination of functions performed by multiple UNEs. In the *Shared Transport Decision*, the Eighth Circuit found that the statutory definition of network element expressly "includes both individual network facilities and the functions which those facilities provide, *either individually or in consort.*"[39] The Eighth Circuit elaborated that, "[p]ursuant to section 251(d)(2) [of the Act], it is within the authority of the FCC to

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37 47 USC § 3(29) (emphasis added)

38 *AT&T Corp.* at 735.

39 *Southwestern Bell Telephone et. al v. FCC*, 153 F.3d 597, 606 (8th Cir. 1998) *petition for cert. filed*, 67 USLW 3561 (Feb. 26, 1999) (No. 98-1381) ("*Shared Transport Decision*").